

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF &  
APPENDIX**



74-2112

TO BE ARGUED BY BERTRAM ZWEIBON

UNITED STATES COURT OF APPEALS

For the Second Circuit.

C.A. Docket No. 74-2112

UNITED STATES OF AMERICA,

Appellee,

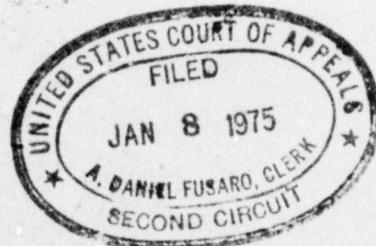
-against-

MITCHELL REIN,

Appellant.

BRIEF AND APPENDICES IN BEHALF  
OF APPELLANT MITCHELL REIN

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :  
Appellee, :  
-against- :  
MICHAEL REIN, :  
Appellant. :  
- - - - - x

STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered July 26, 1974 in the United States District Court for the Southern District of New York (Tyler, J.) adjudicating Appellant Rein after a non-jury trial of being a juvenile delinquent based on the underlying charges that he willfully struck a foreign official in violation of Title 18 U.S.C. Sec. 112(a) and 2. Appellant Rein was sentenced to a probationary term not to exceed his minority.

QUESTIONS PRESENTED

1. Whether the in-court identification by the complainant was so tainted by the suggestive police show-up that the court should have excluded all the identification testimony.

2. Whether limiting the cross examination of the complainant because he was a Soviet Diplomat deprived Appellant Rein of his constitutional right to confront the witnesses against him.

STATEMENT OF FACTS

Appellant Rein and his co-defendant, Zelig Spirn, were charged in an indictment with wilfull and knowingly striking a foreign official and official guest in violation of Title 18 U.S.C. §112(a) and 2. Both Appellant Rein and Spirn waived their right to a jury trial and chose to proceed under the Federal Juvenile Delinquency Act. Accordingly, the case was tried by the Hon. Harold R. Tyler.

Before any testimony was adduced, the Government informed the court that its witness, a Soviet official, agreed to a waiver of diplomatic immunity only as far as the facts surrounding the incident and would also retain his right to object to any particular question on grounds of diplomatic immunity.<sup>(16)\*</sup> When counsel objected to this procedure as a limitation on normal cross examination, the court stated that the position of the complaint was consonant with long-standing principles of international law and it could discern no disadvantage or prejudice that would accrue to the defense.<sup>(17)</sup>

GERMAN KOSENKOV, a secretary of second rank with the Russian representation with the United Nations, testified that his office was at 137 East 67th Street and his residence at 257 East 67th Street at the corner of Second Avenue.<sup>(27-28)</sup>

\*Numerical references are to the pages of the trial transcript.

On March 15, 1973 at about 9:00 p.m., Mr. Kosenkov was on the west side of Third Avenue between 67th Street and 70th Street when he heard two men running behind him. (28-29) He turned around to observe two men breathing heavily. This observation encompassed three to four seconds. (29, 46) He continued walking and the two boys followed approximately two to three feet behind him. (29) When he came to the intersection at 72nd Street and Third Avenue, he stopped for a light. At this point, a red liquid was thrown at him, hitting him in his face and on his raincoat. (29-30)\*\* Kosenkov turned around and saw two men running down 72nd Street towards Lexington Avenue. (32) This time he was only able to observe the boys for one to three seconds. (46) When the liquid hit him, he acknowledged that he was emotionally upset and very nervous. (50) Kosenkov then identified Appellant Rein as one of the young men who had thrown the liquid but he was not sure whether Defendant Spirn was the second person. (33)

Thereafter, Kosenkov went to his mission where he washed himself and then went with the first secretary, Mr. Skotnikov, to the police precinct. (36) At the station, he was told by a police officer to go near a second room and it was then that he immediately recognized the two young men who had assaulted him. (36)

\*\*A stipulation was entered that the FBI laboratory tests indicated that the stains on the raincoat were due to beef blood. (31-32)

On cross examination by Spirn's counsel, the court sustained objections to questions such as whether the witness was a communist, whether he knew the meaning of truth, whether he was involved in the suppression of the rights of Soviet Jews in the USSR, and whether his duties encompassed the issuance of exit visas to those who desired to leave the Soviet Union and reside in Israel. (54-56)

The court admonished counsel that such questions would not be permitted, stated that they were totally irrevelant in the context of this case. (56)

DETECTIVE DAVID GREENBERG testified that on the night in question, his partner, Detective Robert Hanz, and Susan Bell were in a taxi en route to a live radio show. (69) He observed a man falling to the ground and two males bending over him and then running away. Another person assisted the man on the ground who seemed to be covered with blood. Since a crime appeared to have been committed, Greenberg instructed the cab driver to pursue the two males. When the two men stopped in the middle of the street to wave for a cab, they saw the detectives. They then started running in opposite directions. (70) When Greenberg hollered for them to stop, they obeyed and put their hands up. (71) According to Greenberg, the two were searched but no weapons were found. (71) The heavier of the boys finally said that the man had not been hurt or beaten and what he saw was not blood but just red paint. (71) Greenberg

stated that there was a red substance on the clothing of one of the boys and he also kept insisting that it was paint and not blood. (73) When the Detective told them that he would have to know whether the fallen man had been injured, one of the boys said that the man could be found at the Russian embassy. (73)

At the conclusion of the Government's case, Appellant Rein's Counsel argued that the police station identifications procedures was so inherently suggestive that the original identification must be deemed tainted. (109) The court ruled against Appellant Rein on the question of identification. The court's ruling is set forth in Appendix B.

In finding Appellant Rein guilty as charged, the court made specific findings of fact which are set forth in Appendix C.

ARGUMENT

POINT I

THE IN-COURT IDENTIFICATION BY THE COMPLAINANT  
WAS SO TAINTED BY THE SUGGESTIVE POLICE SHOW-UP  
THAT THE COURT SHOULD HAVE EXCLUDED ALL THE  
IDENTIFICATION TESTIMONY.

There is no question but that the Government's case was predicated primarily upon the testimony of the complaining witness, German Kosenkov. Accordingly, it was crucial that his ability to identify both defendants be properly and fairly tested. Such a test, however, was rendered impossible by the suggestive police station identification procedures whereby the complainant was permitted to view the two defendants alone in a room. Under such circumstances, this Court should find that the in-court identification of the complainant was tainted by the suggestive police show up. Stoval v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440 (1969); Biggers v. Tennessee, 390 U.S. 404 (1968); United States ex rel. Robinson v. V. Zelker, 468 F.2d 159 (2d Cir., 1972); United States ex rel. Rivera v. McKendrick, 447 F.2d 30 (2d Cir., 1971).

In all the cases in which a show-up was sanctioned by this Court, the complainant had ample opportunity to identify the perpetrator at the scene of the crime. United States ex rel. Anderson v. Mancusi, 413 F.2d 1012 (2d Cir., 1966); United States ex rel. Williams v. LaValle, 415 F.2d 643 (2d Cir., 1969); United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir., 1970). Here no such opportunity existed

and it was thus imperative that a proper lineup be held. Mr. Kosenkov's initial observation of the two boys was limited to only three or four seconds, and his second observation, after the paint had been thrown, encompassed only one to three seconds. Additionally, during this short interval, it is clear that the diplomat was extremely agitated by this incident and his attention had to be fixed on the paint that was thrown on him and not on the boys who threw the paint. Thus, given the complainant's limited opportunity to observe the boys at the scene of the crime, the identifications used by the police assumed critical importance, and the procedures used in this case were so "unnecessarily suggestive and conductive to mistaken identification" that Appellant Rein was denied due process of law. Stovall v. Denno, supra at pp. 301-2.

Moreover, no valid reason can be advanced by the Government that would excuse the failure by the police to conduct a fair lineup. There was certainly ample time to arrange for a lineup that would properly test the complainant's ability to identify the defendants.

Instead, the police directed the complainant to the room where Appellant Rein and his co-defendant were being held.

In view of the clear violation of Appellant Rein's constitutional rights through this illegal and suggestive show up and the absence of evidence clearly and convincingly

establishing an independent basis for the complainant's trial identification, Appellant Rein's conviction must be reversed.

POINT II

LIMITING THE CROSS EXAMINATION OF THE COMPLAINANT BECAUSE HE WAS A SOVIET DIPLOMAT DEPRIVED APPELLANT REIN OF HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

Merely because Mr. Kosenkov was a Soviet Diplomat, the court curtailed his cross examination by refusing to permit counsel to inquire into his motives for testifying or his possible bias against the defendants. Such restriction on the witness' cross examination resulted in a denial of defendants' constitutional right to fully and effectively cross examine the witnesses against him. Douglas v. Alabama, 380 U.S. 400 (1965); Pointer v. Texas, 380 U.S. 415 (1965); Fountain v. United States, 342 F.2d 849 (4th Cir., 1965).

It is settled law that cross examination is the major tool used by defendants in a criminal trial for ascertaining the truth. United States v. DeSisto, 329 F.2d 929 (2d Cir., 1964). A defendant is entitled to impeach the credibility of any witness who testifies against him by conducting a thorough cross examination. United States v. Brown, 313 F.2d 197 (2d Cir., 1963). Additionally, only by cross examination will the defendant be able to establish the witness' motive for testifying against him. United States v. Haggart, 438 F.2d 396 (2d Cir., 1971); United States v. Mahler, 363 F.2d 673 (2d Cir., 1966). The questions posed by counsel for Defendant Spirn served such a purpose. It was important to ascertain

whether the witness was involved in the suppression of the rights of Jews in the USSR or whether he had anything to do with the issuance of exit visas to those who desired to leave the Soviet Union and reside in Israel. Such information bore directly on the issue of whether the witness harbored any hostility to the two defendants who obviously were concerned with such questions.

The court refused to permit such cross examination solely because it was of the opinion that the limitation of the cross examination of a foreign diplomat was consistent with long standing principles of international law. The court's position was erroneous. The court evidently confused the question of whether a diplomat is a competent witness with the issue of whether he can be subjected to a thorough cross examination once he is permitted to testify. While it has been held that a diplomat who waives immunity from prosecution for perjury is a competent witness (Diehl v. United States, 265 F.2d 345 (D.C., 1959)), it has never been held that once a diplomat takes the stand his cross examination can be curtailed by the court.

Hence, as Appellant Rein was denied his constitutional right to fully and effectively cross examine the key witness against him, his conviction must be reversed and a new trial ordered.

CONCLUSION

FOR THE REASONS STATED IN POINT I, THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED: ALTERNATIVELY, IN ACCORDANCE WITH POINT II, THE CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

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APPENDICES

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APPENDIX B - COURT'S RULING REGARDING  
IDENTIFICATION

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APPENDIX C - FACT FINDING OF GUILT

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2 the next room and he started pointing to them.

3 He, Greenberg, admitted that he didn't understand  
4 what the victim was saying and obviously he could not, the  
5 victim was speaking in his native tongue. But the indication  
6 by his gestures were that he was pointing them out as the two  
7 men.

8 Then he went into the room later, according to his  
9 testimony, that is Kosenkov did, and pointed them out. Kosen-  
10 kov didn't say there were no people in that room other than  
11 the two men. He just said that he didn't pay any attention  
12 to anybody else. These were the two men that he recognized.

13 To me, that is somewhat of a distinction from  
14 what you are arguing factually. The point under the cases as  
15 you and I know is whether or not there was some pretrial  
16 identification procedures or otherwise which were so imper-  
17 missively suggested or result oriented to begin with to give  
18 rise to a very substantial likelihood of an irreparable  
19 misidentification here in the courtroom.

20 [ As I consider the totality of the circumstances,  
21 most particularly what Kosenkov did here today in the court-  
22 room, I don't think that there was any such impermissibly  
23 suggested procedures. If there were, I'm satisfied as a  
24 rational matter, that there was no substantial likelihood of  
25 misidentification here today, particularly given the continued

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2 refusal of Mr. Kosenkov to make any positive identification  
3 except as to one man.

4 I might also note and I don't mean to criticize  
5 you or anybody else that might be involved in this, it seems  
6 to me it is perfectly fine given the circumstances here today  
7 that various persons were strategically located in relation  
8 to the two defendants as they sat here out in the public por-  
9 tion of this courtroom. That in itself fortifies my conclu-  
10 sion that there was nothing impermissively suggestive done  
11 here or if there was any likelihood that Kosenkov would be  
12 influenced by it.

13 Under very difficult circumstances facing people  
14 who looked very similar and wearing similar articles of  
15 clothing and in close conjunction at that position to one  
16 another, Kosenkov nevertheless was able to go and identify  
17 Mr. Rein. He was unable to identify Mr. Spirn and he has  
18 consistently told everybody before trial and at trial that  
19 he could not make a positive identification of Sprin.

20 Therefore, I reject your arguments under the totality  
21 of the evidence and any reasonable inferences which this  
22 Court can draw from there.]

23 Now, Mr. Persky, what say you, sir?

24 MR. PERSKY: I think that it is clear from the  
25 testimony that has been elicited this morning from the

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APPENDIX C

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2 MR. RAKOFF: The government has no objection.

3 THE COURT: Mr. Persky, if you would just sit  
4 down a minute, and I will hear Mr. Zweibon and Mr. Rakoff.  
5 Is there any other argument that either of you gentlemen:  
6 wish to bring to bear or to the Court's attention in respect  
7 to the case as against Mr. Mitchell Rein?

8 MR. ZWEIBON: We rely on the oral arguments we  
9 have already made to the Court.

10 THE COURT: Well, I'm going to find and make  
11 special findings even though I haven't been requested to.

12 Under the rules I think it would be useful to  
13 these young men and all concerned, if I did.

14 [C] My findings on the case as it effects Mitchell  
15 Rein are as follows:

16 On March 15, 1973, on a Thursday at about 9  
17 o'clock in the evening, Mitchell Rein and another, were  
18 following one Honorable German Kosenkov, a secretary of the  
19 second rank at the Soviet Mission to the United Nations. As  
20 such, he had been since September 15, 1971.

21 Kosenkov was in the habit, as he told us, of  
22 walking home directly along Third Avenue from the Soviet  
23 Mission on East 67th Street to his house on East 87th Street.  
24 As Kosenkov stopped for the red light at the corner of Third  
25 Avenue and 72nd Street; he had been several seconds before,

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2 at least, aware of two men pursuing him. He had continued  
3 walking until he hit the corner of 72nd and waited for the  
4 light.

5 As he was waiting at the light, he was set upon  
6 by these two men and apparently Kosenkov was the victim of  
7 some touching by one or both of the men, but most importantly,  
8 from his testimony, he was hit on both sides as both men threw  
9 upon him a red substance which later, as a stipulation by  
10 counsel shows, the FBI laboratory has determined to be beef  
11 blood or cattle blood.

12 Shortly after this blood was thrown upon him  
13 covering his raincoat and his face and head, the two perpe-  
14 trators fled down 72nd Street toward Lexington Avenue.  
15 Kosenkov was offered assistance by a male passerby and cleaning  
16 himself with his handkerchief, going to the nearby Soviet  
17 Mission, where he changed clothes to an extent.

18 At the insistence of his first secretary, Mr.  
19 Skotnikov, the two men later went to the 19th Precinct,  
20 which is located right across, virtually, from the Soviet  
21 Mission or Embassy as it is sometimes called; the precinct  
22 being located at 153 East 67th Street.

23 While the victim Kosenkov was interviewed in the  
24 so called "muster room," which is the first room you come  
25 into when you come into the first or front door of the 19th

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2 Precinct. He observed in the doorway or just inside the  
3 doorway of an adjacent or second room, two men. He identi-  
4 fied by gesture at least, the two men as the men he believed  
5 to have been the perpetrators.

6 However, that evening, Kosenkov was also asked to  
7 go into the room and as he went into that second room he was  
8 able to recognize the two men as the perpetrators even though  
9 he had not then or apparently even knew, I gather, knew their  
10 names.

11 Sometime thereafter, the police showed Kosenkov  
12 15 to 20 photos. As he told us on the stand today, Kosenkov  
13 was only able to make a positive identification of the  
14 defendant Mitchell Rein. He was unable to make a positive  
15 identification of the defendant Spirn.

16 Today in the courtroom, when asked to do so, the  
17 victim, witness, Kosenkov, identified specifically the  
18 defendant Rein only. He was unable to make a positive iden-  
19 tification of anybody else. Most particularly, the defendant  
20 Spirn.

21 Now, on the evening in question, therefore, I  
22 conclude as ultimate findings of fact that the defendant  
23 Mitchell Rein was one of the two perpetrators who assaulted  
24 second Secretary Kosenkov at the corner of 72nd Street by  
25 throwing this liquid form, blood of cattle upon the second

(7-5)

2 secretary.

3 I find further that it was done wilfully and  
4 knowingly by the two defendants in question; that they  
5 intended this result; they knew what they were doing and it  
6 didn't happen by innocence or mistake.

7 I further find that the mere happening of throwing  
8 this substance, being cattle blood, upon the person of the  
9 Second Secretary, constituted an assault which under Section  
10 112, is understood to connote the ordinary common law meaning  
11 of the term or concept, assault.

12 I further rule that there is no requirement  
13 that the government show beyond a reasonable doubt or other-  
14 wise that the offender in question knew that Kosenkov was  
15 a public official of the kind defined in Section 112.

16 As a matter of fact, however, I infer from the  
17 proofs, at that time defendant Mitchell Rein was aware that  
18 the complaining witness and victim, German Kosenkov, was a  
19 responsible and important official from the Soviet Embassy  
20 or Mission.

21 I believe, therefore that all of the essential  
22 elements mandating a conviction under Section 112 of Title  
23 18 of the United States Code have been proven. Of course,  
24 this is a juvenile proceeding and therefore I find and deter-  
25 mine that as described, the defendant Mitchell Rein is guilty

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2 of juvenile delinquency as charged in the superseding infor-  
3 mation.]

4 A presentence report will be ordered and the mat-  
5 ter will be put down for discussion and sentence on July 26,  
6 1974 at 2:15 o'clock in this room.

7 Now, Mr. Rakoff, is there any further specific  
8 findings you wish this Court to make?

9 MR. RAKOFF: No, your Honor. I would ask -- my  
10 memory may be wrong on this -- I believe your Honor stated  
11 that the defendant -- the complainant Kosenkov identified  
12 from the photo spread, Mr. Rein. Of course, he did not know  
13 the name. That was an inference.

14 THE COURT: That's right and that is the inference  
15 I am drawing.

16 MR. RAKOFF: Fine, thank you, your Honor.

17 THE COURT: It is only important because of the  
18 understandable argument made by Mr. Zweibon, that there were  
19 impermissible suggestive techniques used by the police in  
20 order to lead to the positive in-court identification.

21 I have already found and determined on the record  
22 and I don't think I need represent the reasons why, that I  
23 disagree on two counts:

24 First of all, I don't think the procedures used  
25 here were impermissibly suggestive. If they were, they

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